Filed 4/6/07

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. AARON LYNDALL COOPER, Defendant and Appellant.	A108723 (Alameda County Super. Ct. No. C125227)

This case has managed to wind its way back to us for the third time as a result of an order of the United States District Court which granted defendant's petition for writ of habeas corpus, followed by a retrial of the action and jury verdict that for a second time found defendant guilty of first degree murder (Pen. Code, § 187, subd. (a))[1] and kidnapping (§ 207, subd. (a)).[2] Defendant complains in this appeal that the federal district court's decision in the writ of habeas corpus proceeding is binding under principles of collateral estoppel or law of the case, and precludes the murder conviction. He also argues that he was improperly denied his rights to substitute his appointed counsel and to represent himself, the trial court gave prejudicial instructions concerning his custody status, gave erroneous instructions concerning accomplice testimony, and

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II, III, IV, V, and VI of the Discussion.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Defendant was found not guilty by the jury of a charge of possession of a firearm by a felon (§ 12021, subd. (a)(1)). After the jury verdict, defendant admitted that he suffered prior violent and serious felony convictions and served prior prison terms as alleged in the information. (§§ 667, subd. (e)(1); 667.5, subd. (b); 1170.12, subd. (c)(1).)

finally that his murder conviction is not supported by substantial evidence. We conclude that neither collateral estoppel nor law of the case principles apply in the present case, defendant's motions to discharge his appointed attorney and represent himself were properly denied, no prejudicial instructional errors were committed, and the murder conviction is supported by the evidence. We therefore affirm the judgment.

PROCEDURAL HISTORY

The lengthy, protracted path of the case began with a joint jury trial of defendant Aaron Cooper (defendant or Cooper) and his codefendant Fredrick Cross, after which Cooper was convicted of the first degree murder of William Highsmith (§ 187), carjacking (§ 215), felon in possession of a firearm (§ 12021), and kidnapping (§ 207). The jury also found that defendant was armed with a firearm in the commission of the murder, carjacking and kidnapping offenses (§ 12022, subd. (a)). In a separate bifurcated proceeding the trial court found that Cooper had served a prison term for prior conviction of a felony (§ 12021) and that he had been convicted of a serious felony (§ 211) which qualified as a prior strike under section 667, subdivision (e)(1). On March 14, 1996, the trial court sentenced Cooper to a total term of 71 years to life. The jury convicted codefendant Cross of first degree murder, carjacking and kidnapping, and found arming enhancements for each offense to be true. At a hearing on April 18, 1996, Cross was sentenced to a total sentence of 32 years to life.

In the first, consolidated appeal of their convictions, Cooper and Cross challenged the admission into evidence portions of an out-of-court statement of Miltonous Kingdom made to Oakland police officers while he was incarcerated in a Mississippi jail. When the prosecution called Kingdom as a witness at trial, he asserted the privilege against self-incrimination. The trial court admitted a redacted transcript of Kingdom's statement, which identified both Cooper and Cross as active participants in the kidnapping and murder of Highsmith, but also tended to inculpate Kingdom himself as an accessory to

the crimes.[3] The defendants claimed that Kingdom's statement did not fall within the declaration-against-penal-interest exception to the hearsay rule, and that admission of the redacted statement violated their confrontation rights. We affirmed the convictions for kidnapping and first degree murder in an opinion filed on November 9, 1998. We found that the trial court did not abuse its discretion by finding that the statement as redacted was sufficiently trustworthy to be admissible under Evidence Code section 1230.

After the California Supreme Court denied the defendants' petition for review, on October 4, 1999, the United States Supreme Court granted a petition for writ of certiorari, vacated the judgment, and remanded the case to us "for further consideration" of the admissibility of Kingdom's statement in light of *Lilly v. Virginia* (1999) 527 U.S.116 [144 L.Ed.2d 117, 119 S.Ct. 1887] (*Lilly*). In our second opinion in this case filed on July 6, 2000, we found "two significant differences from the *Lilly* decision" that provided a "measure of reliability" of Kingdom's statement, but nevertheless concluded that the statement was inadmissible under the *Lilly* guidelines, and therefore the trial court erred by admitting it. We proceeded to "examine the record to determine if the error was harmless under the reasonable doubt test of *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824], which governs federal constitutional error." Upon review of the record, we concluded that the murder conviction of Cross must be reversed, but "that the error was harmless beyond a reasonable doubt in the conviction of defendant Cooper for murder."[4] Our conclusion of harmless error as to Cooper was based upon our examination of the "direct and circumstantial evidence" against him that demonstrated "to us beyond a reasonable doubt that the error did not contribute to the verdict."

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[3] In a separate trial Kingdom was subsequently convicted of the first degree murder of Highsmith committed during a kidnapping (§§ 187, subd. (a); 189; 190.2, subd. (a)(17)(B)), and sentenced to state prison for life without the possibility of parole. The judgment against Kingdom was affirmed on appeal. (*People v. Kingdom* (Sept. 13, 1999, A082911) [nonpub. opn.].)

[4] Due to the state of the evidence presented at trial we undertook a "harmless error analysis under *Chapman*" that was "distinct as to each defendant."

The California Supreme Court subsequently denied Cooper's second petition for review, and the United States Supreme Court denied his second petition for writ of certiorari. This court thereafter denied his petition for writ relief.

Cooper then filed an action for writ of habeas corpus in the United States District Court in November of 2002. In a decision filed on April 14, 2004, the district court examined numerous claims of error made by Cooper, but for purposes of this appeal the primary inquiry was again directed at the conceded "Confrontation Clause violation" in the admission of Kingdom's statement, and the prejudice associated with the error. The district court found that the "admission of Kingdom's statement to police had a substantial and injurious effect on the jury's verdict against Cooper," not only "with respect to the murder conviction," but also as "to the kidnapping and carjacking convictions." The court observed that "[a]lthough the sufficiency of the evidence is not the standard for determining whether an error resulted in prejudice, [citation], the fact that there was insufficient evidence without the improperly admitted evidence shows how powerfully if affected the jury's verdict of guilt on the murder count." On the erroneous admission of Kingdom's statement, the district court ruled: "Because the Confrontation Clause violation had a substantial and injurious affect on the jury's verdict and the state court's finding of harmless error was an unreasonable application of clearly established federal law, Cooper is entitled to a retrial on all of the charges against him."

The district court also resolved the claim of "a due process violation based on the insufficiency of the evidence." "In determining the sufficiency of the evidence" to support the jury verdict, the court excluded "the improperly admitted statement of Kingdom which should not have been admitted at trial because Cooper was unable to confront him." The district court then embarked upon a wholesale, adverse assessment of the credibility of the witnesses at trial and the inferences drawn by the jury.[5] The court

[5] " 'When reviewing convictions for sufficiency of the evidence,' " the district court " 'must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*United States v. Rodriquez* (9th Cir. 2006) 464 F.3d 1072, 1078–1079,

found that a "rational jury could not have" found "proof beyond a reasonable doubt" when the "improperly admitted evidence" was "excluded from the equation." Therefore, in addition to the prejudicial "Confrontation Clause violation," the court "determined" that "Cooper's right to due process was violated because there was insufficient evidence to support the murder conviction – a determination which shows that [the Confrontation Clause violation] was not harmless error." "In such a case," the court declared, "retrial rather than acquittal is the remedy. '[T]he Double Jeopardy Clause allows retrial when a reviewing court determines that a defendant's conviction must be reversed because evidence was erroneously admitted against him, and also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction.' [Citation.] In other words, the Clause 'does not bar retrial after a reversal based on the erroneous admission of evidence if the erroneously admitted evidence supported the conviction.' [Citations.]"[6] (*Cooper v. McGrath* (N.D. Cal. 2004) 314 F.Supp.2d 967, 998–999.)

The case thus returned to the superior court for retrial as ordered. Cooper's motions to dismiss the murder charge on grounds of double jeopardy, collateral estoppel, and law of the case were denied both before and during retrial. Following the

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italics omitted.) The factual determinations made in the state court must be presumed correct, and the federal court must accept all factual findings made by the state court unless the petitioner can rebut "the presumption of correctness by clear and convincing evidence." (28 U.S.C. § 2254(e)(1); *Purkett v. Elem* (1995) 514 U.S. 765 [131 L.Ed.2d 834, 115 S.Ct. 1769]; see also *Thompson v. Keohane* (1995) 516 U.S. 99, 108–109 [133 L.Ed.2d 383, 116 S.Ct. 457]; *Langford v. Day* (9th Cir. 1997) 110 F.3d 1380, 1388.) In conducting the inquiry, the federal court must remain mindful of "the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review." (*Wright v. West* (1992) 505 U.S. 277, 296 [120 L.Ed.2d 225, 112 S.Ct. 2482] (plur. opn.); cf. *Yarborough v. Alvarado* (2004) 541 U.S. 652, 663–664 [158 L.Ed.2d 938; 124 S.Ct. 2140, 2149]; *Herrera v. Collins* (1993) 506 U.S. 390, 400 [122 L.Ed.2d 203, 113 S.Ct. 853]; *Engle v. Isaac* (1982) 456 U.S. 107, 128 [71 L.Ed.2d 783, 102 S.Ct. 1558].)

The reviewing court must not only examine the evidence "in the light most favorable to the prosecution," but also accept "all reasonable inferences that may be drawn from this evidence." (*Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262, 1276.)

[6] "The claims concerning the sufficiency of the evidence on the kidnapping and carjacking convictions" were "rejected."

presentation of evidence, the jury convicted Cooper of first degree murder and kidnapping. Now, over 10 years after the first trial of this action, we have a third appeal before us.

STATEMENT OF FACTS

On August 16, 1995, the "very decomposed" body of William Highsmith, known by the nickname "Coco,"[7] was discovered in a wooded area of the Oakland hills near Skyline Reservoir. The "bottom part" of the victim's short-sleeve T-shirt had been torn away. A piece of cloth, apparently from the T-shirt, had been tied around his face and mouth so that it separated his teeth; a cloth gag had also been pushed into his mouth. The victim's jacket had been pulled down in the back and around his wrists to restrict the movement of his arms. His pants and boxer shorts had been pulled down to the level of his thighs. Scissors were found a few feet away from the body on the ground.

An autopsy revealed that the victim had died from "a gunshot wound to the head." The bullet entered through the left cheekbone of the victim, passed through the skull, and lodged between the right side of the skull and the scalp behind the ear. The "extensive fracturing of the skull" suggested a "contact wound," although no gunshot residue or splitting of the skin was detected. Due to the advanced state of decomposition of the body, a forensic pathologist offered the opinion that Highsmith had died "very near the time that he was last seen alive," nearly two weeks before on August 3, 1995, perhaps "the same day."

Witnesses had observed the abduction of Highsmith by three men at the intersection of 12th and Market Streets in Oakland on August 3, 1995. That morning, Zanetta Hodges talked with Highsmith, whom she had known most of her life, in the common area behind her residence in West Oakland. Highsmith told Hodges that he intended to "beat up the person" who had accused him of stealing a car. Highsmith

[7] We will sometimes refer to the victim William Highsmith as Coco, as was often done during trial.

added that he "was going to meet" with people "at the store" to discuss the stolen car accusation.

After speaking with Highsmith, Hodges went to East Oakland with her close friend Juanita "Goodie" Walton to get a food stamp card. As they returned to the area of 12th and Market Streets on their way to pick up "food stamps in West Oakland," Walton saw "people she knew" sitting in a blue Oldsmobile Delta 88 parked at the side of the Mingleton Temple church. At Walton's request, Hodges backed up her car and stopped across the street in front of Bottles Liquors to talk to the three men seated in the Oldsmobile: the driver Cross, the front seat passenger Miltonous Kingdom, and the rear seat passenger defendant. Hodges was acquainted with defendant and Cooper, but had not met Kingdom before. Hodges testified that defendant was wearing black leather gloves, and Walton noticed black gloves on all three of the occupants of the Oldsmobile. They were also wearing "black hoody" jackets.

Walton walked up to the Oldsmobile and asked the men inside, "what were they doing out here" in West Oakland. Defendant said "they were coming to look for someone who stole their drugs" and car, specifically Highsmith. Hodges heard Cross say, referring to Highsmith, "That nigger stole my car, Goodie." When asked by defendant, "what type of nigger was Coco," Walton replied: "That nigger, Coco, he ain't stealing no car. He the type of nigger, he don't get his shoes dirty. He don't steal cars. He sells cars."

A red Corvette driven by K. K. Parker,[8] with Highsmith in the passenger seat, then pulled up and parked on the street near the driveway of the church behind the Oldsmobile. Defendant said, "All right then," and Walton was told to "get away from the car." Walton returned to Hodges's car, whereupon Hodges drove away as the men in the Oldsmobile left that car and met in the parking lot by the church. As she drove away, in the rear view mirror Hodges observed defendant touch Highsmith "on the shoulder."

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[8] The red Corvette was owned by Parker's girlfriend Tisha Williams, but was often driven by Parker.

Rodney Love was also present at the scene of the abduction.[9] While Love was standing outside the Bottles Liquor store at 12th and Market Streets, a tall Black man about 20 years old – whom he neither knew nor identified – got out of a "blue four door Delta," approached him, and asked if he was "Coco."[10] Love saw a large revolver "pokin' out" of the man's shirt. Love said that he was not Coco, and the man walked back to the blue Oldsmobile, in which two other men were sitting. The occupants of the Oldsmobile wore black "puffy" jackets, and at least two of them wore gloves. Love thought they all had guns. According to Love, soon thereafter K. K. Parker drove up in a red Corvette, with Highsmith in the passenger seat, and parked behind the Oldsmobile. Love unsuccessfully attempted to "motion" to his friend Highsmith to warn him. Parker and Highsmith got out of the Corvette and began talking to the men from the blue Oldsmobile, one of whom briefly grabbed Parker by the neck but then released him. Parker ran into the liquor store. After Highsmith admitted to the men that he was "Coco," they "pull[ed] the guns out," five or six shots were fired, and they forcibly pushed the victim into the trunk of the blue Oldsmobile. One of the three men from the Oldsmobile got into the red Corvette, then both the Oldsmobile and the Corvette were driven off in the same direction.

An employee at Bottles Liquor store, Musa Hussein, testified that at about 4:00 p.m. on August 3, 1995, he saw Highsmith outside the store engaged in an argument or heated conversation with three other men across the street by the church. Highsmith was a regular customer of the liquor store, but the other three men were not known to Hussein and he could not identify them, although he gave descriptions of them to the police. Hussein also noticed two vehicles, an "old American" car and a red Corvette, parked near

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[9] At trial, Love testified that he did not have "any memory at all" of the details of the events he witnessed on August 3, 1995. An "hour or two after the event," however, Love gave a statement which was an accurate recitation of his observations. A tape of Love's statement to the police was admitted in evidence at trial and played for the jury, as was a portion of his consistent testimony at the first trial in 1995.

[10] Love was acquainted with Coco.

the men. According to Hussein's statement given to the police immediately after the kidnapping, which was read to the jury, one of the men arguing with Highsmith "had a long gun." Another man opened the trunk of the vehicle, while a third man grabbed Highsmith. Hussein then ran back into the store to call the police, but heard "gunshots" outside. Customers yelled, "they're putting him in the trunk."

Douglas Wright, an investigator for the Alameda County District Attorney's Office, testified that at around 4:00 p.m. on August 3, 1995, he was driving on 12th Street, approaching Market, when he heard what he "thought were two gunshots ahead" of him. He then observed a red Corvette parked on the right side of the road facing the same direction Wright was traveling. A man was standing behind the Corvette who was described by Wright as "male Black, about 5' 11" in his mid-20's, 170 to 180 pounds." Wright was unable to identify the man, but testified that he was "consistent" in size and build with defendant. As Wright drove by, the man quickly ran to the driver's side of the Corvette, jumped in, "took off, squealed and accelerated around the corner." Wright "got a partial plate" on the Corvette, YOK953, but the last three numbers were incorrect. Across the street, Wright noticed people "ducking down" behind a parked car as if they were "trying to get out of the way." To his left, in the Bottles Liquor store parking lot, Wright saw an "Arabic looking gentleman" who was staring in the direction of the fleeing Corvette, and a "male Black" who was "hustling into the store." Wright "knew something was wrong," so he asked a man in a car "what had happened." The man, who looked "nervous and scared," said that "there had been a shooting and a kidnapping." Wright reported the crime through the "District Attorney's channel," and asked "them to call the police."

Raynetta Thomas, the victim's sister, testified that on the afternoon of August 3, 1995, she visited briefly with "Coco" and K. K. Parker at her mother's apartment before they left in a red Corvette about 3:45 or 4:00 p.m. A "few minutes" later she heard that a kidnapping had occurred at 12th and Market.

Oakland Police Officer Michael McArthur received a call of "a shooting" at 12th and Market at 4:08 p.m., and arrived there within two minutes. As Officer McArthur

spoke with Musa Hussein, K. K. Parker interrupted and began to "talk over him." Parker "seemed to be eager" to tell Officer McArthur "what had happened." During the conversation, however, Parker's attitude changed; he "decided he didn't want to talk" or "cooperate anymore." Parker refused to sign his statement to the officer, and "started to walk away." Parker was then arrested on outstanding warrants and taken into custody.

After Hodges and Walton procured their food stamps at 4:09 p.m., they returned directly to 12th and Market Streets. Police officers were "all over the place." People on the street were quite agitated and concerned over the abduction of Highsmith, as he was a well-liked figure in the West Oakland neighborhood. After speaking with the police, Hodges and Walton, along with "various people," searched for Highsmith, defendant, Cross and Kingdom for hours without success.

About 7:00 on the night of the abduction of Highsmith, George Archambeau was driving westbound across the San Mateo bridge toward Foster City when he observed a "small, blue car" that was stopped with a red Corvette in front of it. As Archambeau passed the two cars, he noticed an African-American man standing outside the red Corvette, and another in the driver's seat. The man standing outside the Corvette threw an object that appeared to be a "folded over" grocery bag over the bridge into the bay. Archambeau drove on, but the Corvette "came driving by" him "extremely fast" with two occupants in the vehicle, both African-American men. As the Corvette "got caught in the traffic" ahead, Archambeau "wrote down the license plate," 2YQK292, along with the notation "red 'vette," and contacted the highway patrol.

At around 9:00 the same night, Moamer Mohamed was working at the Bottles Liquor store. As he was leaving the store he observed a red Corvette in front of the parking lot that blocked his exit. The engine of the Corvette was running and the window was open, but no one was inside. Mohamed saw an African-American man wearing a checkered shirt and dark gloves running away from the parking lot toward downtown Oakland. Mohamed moved the Corvette and called the police. The only identifiable fingerprints found on the red Corvette belonged to K. K. Parker or the victim.

When Walton returned to her residence later that night with Hodges, Kingdom's blue Oldsmobile Cutlass was parked on the street in front of the house. She was frightened, and did not look in the car or immediately contact the police. The vehicle was located by the police, however, in front of Walton's house at 9962 Voltaire in East Oakland at about 10:00 that night.

Walton was then taken into custody and transported to the Oakland Police Department for questioning. She testified at trial that she fallaciously told investigating officers that she saw defendant, Kingdom and Cross force Highsmith into the car trunk. Walton admitted that she told "lies" to the officers, but testified that she did so to try to help her friend Highsmith. Walton also testified that she received a telephone call from defendant from jail during which he said to her, "Don't go to court." Defendant offered her money not to testify. Walton also received "death threats" from other people unknown to her.[11]

Defendant was arrested about an hour after Walton was taken into custody. He was a passenger in a blue 1985 Oldsmobile Royale driven by Carl Anderson that was detained around 11:00 p.m. for expired registration tags.[12] Anderson was taken into custody on a "no-bail misdemeanor warrant," and after defendant was identified he was arrested in connection with the carjacking and kidnapping of Highsmith that afternoon. Defendant was wearing a green plaid shirt – like the one Mohamed had seen earlier that evening worn by the man who ran away from the red Corvette – and green pants; his "hair was in corn rows." Black leather gloves were found on the right front passenger seat which had been occupied by defendant, and a black leather jacket was left in the back seat of the vehicle. Both of the gloves subsequently tested positive for gunshot

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[11] Walton testified at the preliminary hearing before the first trial, and at Kingdom's trial, but did not testify at defendant's first trial.

[12] The 1985 Oldsmobile Royale driven by Anderson in which defendant was arrested is not the same vehicle as the blue Oldsmobile Delta Cutlass registered to Kingdom that was observed at the scene of the kidnapping of Highsmith and seized from in front of Walton's residence.

residue, as did the left sleeve of the jacket. No blood was detected on the jacket or gloves. No gunshot residue was found on defendant's hands.

During the interview of Walton very early the next morning, defendant was confined in a locked interview room nearby. When Walton saw defendant in the hallway she identified him as one of the men in the blue Oldsmobile at 12th and Market just before the abduction of Highsmith. She subsequently identified photographs of Cross and Kingdom from a lineup as the other two men.

The blue Oldsmobile registered to Kingdom was processed for evidence and photographed on August 5, 1995. The exterior was clean, and did not appear to have been driven on a dirt road. The top side of the muffler in the trunk was shiny and clean, and had wipe marks on it, but the bottom side was dirty. The trunk did not have indications, such as hair, blood, or fingerprints, that a person had been transported in it. No identifiable fingerprints were found anywhere on the car.

At the scene of the kidnapping at 12th and Market, three spent shell casings were recovered: two were brass nine-millimeter "Lugar caliber" casings fired from the same weapon, "an S.W.D.-type firearm;" the other, apparently of older vintage, was a brass .45-caliber semi-automatic cartridge fired from another type of weapon. A criminalist also examined the bullet extracted from the victim's head, and determined that it was fired from one of two similar size firearm calibers: a .40-caliber Smith and Wesson, or a 10-millimeter auto caliber.[13]

Warrants were issued for the arrest of Cross and Kingdom after they were identified by investigating officers as the other two men associated with the abduction of Highsmith. The Oakland Police Department was notified on August 10, 1995, that Cross had been arrested in Mississippi. Two taped statements were subsequently taken from him by investigating officers of the Oakland Police Department early the next morning. Kingdom was arrested on November 6, 1995, in Mississippi. Two days later when he

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[13] Probably the former, which, the criminalist observed, is a more popular weapon.

was confronted with the statements made by Cross, he gave a statement to an Oakland police officer which was found inadmissible in the second appeal before this court and the federal habeas corpus proceeding.

Both taped statements made by Cross, and his testimony given at the first trial, were admitted in evidence and read to the jury at the second trial.[14] In his first statement Cross told the officers that he moved to California in 1992, and lived with his aunt on 55th Avenue in Oakland until a few months before his arrest, when he stayed in motels in Oakland. He stated that Kingdom is his cousin, and he met defendant through one of his drug selling partners after he began living in Oakland.

Cross reported that the Sunday before the abduction of Highsmith his 1988 "blue Iroc" Chevrolet, which contained cash in the amount of $6,700, clothing, and other valuables, was stolen in Emeryville while he was visiting a girlfriend. He and a companion "drove around" West Oakland looking for the car. Youngsters told Cross that they had seen "some fool from Ghost Town" driving his Iroc around, so he continued to look for the car in the Ghost Town area of Oakland. Someone else told Cross that "Coco," a man with two gold teeth who lived on Adeline and "steals cars," was the one who was seen driving the Iroc around. The next day, Cross and Kingdom drove through West Oakland in the blue Oldsmobile looking for the Iroc. They heard that Coco was on 12th and Market, so they drove there. When a man named "Lon" said that he knew Coco, Cross gave him his pager number for Coco to call him.

The following day between noon and 2:00 p.m., Cross heard from Coco, who denied that he stole the Iroc. They agreed to meet at 12th and Market to discuss the matter further. With Cross driving, he, Kingdom and Cooper went to 12th and Market in the blue Oldsmobile. Cross did not find Coco among the people on the street, then

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[14] Cross refused to testify at the second trial and was found unavailable as a witness. The jury was aware that he was serving a life term for an unrelated murder. The jury also heard through stipulation that Kingdom was convicted after trial in 1998 for the first degree murder of Highsmith with a special circumstance of kidnapping, and was serving a sentence of life without parole.

walked back to the Oldsmobile. As he did, two men approached the car and one of them said, "I'm Coco." After Coco said, "I don't take cars," Cross began to "walk off." He returned to the Oldsmobile, and they drove away. He took a flight to Memphis later that night. Cross denied that they kidnapped Coco.

In his second statement taken a few hours later, Cross admitted that when he, defendant and Kingdom arrived at 12th and Market in the blue Oldsmobile, they all had nine-millimeter handguns, although he denied that he owned any of the guns or had one in his immediate possession at the scene. Cross said he was outside the car when Coco appeared with another man in a red Corvette. While he and Coco were "talking" on the sidewalk, "everything jumped off." Suddenly, Kingdom and Cooper, with guns drawn, escorted Coco to the rear of the car and forced him into the trunk. Someone fired shots, but Cross claimed it was not him.

Cross and Kingdom then got in the Oldsmobile, while defendant jumped into the red Corvette. They drove both cars to East Oakland, around 109th and Foothill, where defendant left the red Corvette and got back in the blue Oldsmobile with them. Coco was still in the trunk. They "drove around" for a while, then returned to the E-Z 8 motel, where Cross was staying. Cross and Kingdom went into the motel room, but defendant drove away with Coco. Cross claimed that Coco was alive in the trunk when he and Kingdom left the Oldsmobile for the hotel room. Cross was in the motel room for 40 minutes to an hour packing his clothes until defendant returned in the car. Cross and Kingdom then joined defendant, and with Kingdom driving they returned to the location at 109th and Foothill where they previously parked the red Corvette. Defendant left the Oldsmobile and returned to the Corvette. Defendant drove off in the Corvette, and Cross did not see him thereafter. He and Kingdom drove the Oldsmobile to Voltaire and 100th, where they parked it. While Cross was in the Oldsmobile, he did not hear any noise or look inside the trunk.

When they left the car at Voltaire and 100th, Cross thought Coco was still alive in the trunk, and someone would find him later, although he acknowledged the "possibility" that the victim had been shot during his abduction. Cross and Kingdom also left the guns

in the car and began to walk back toward MacArthur when a friend drove by and gave them a ride to the E-Z 8 motel. Cross said he traveled to Memphis the next morning. He did not know Coco was still missing until later, and "didn't think it was that serious." Cross also told the officers he did not know where Coco was.[15]

In his testimony at the first trial, Cross added details to his second statement and changed some of his account of the events. Cross testified that his blue Iroc was stolen on July 30, 1995. Taken with the car were its contents: $600 to $700 in cash,[16] large amounts of marijuana and powder cocaine that were worth thousands of dollars if sold on the street, jewelry and clothes. The drugs had been purchased the same day from defendant's friend at 100th and MacArthur. Cross financed a small portion of the drug purchase, but defendant contributed much more, between $2,000 and $4,000. Cross had intended to drive the Iroc to Greenville, Mississippi to visit his mother and sell the drugs. The theft of the car altered those plans. Defendant was "upset" when he learned the car and drugs had been stolen. He accompanied Cross and Kingdom when they searched in West Oakland for the Iroc the day before the abduction of Highsmith. Defendant used "threatening words" to someone they encountered in a green station wagon.

Cross testified that he accepted Coco's word by telephone on August 3, 1995, that he "didn't have" the car, but defendant was insistent upon going to 12th and Market Streets to meet Coco. Defendant said: "Let's go out there," so Cross agreed. Cross drove the blue Oldsmobile to 12th and Market Streets, Kingdom sat in the front seat, and defendant was in the rear passenger seat. They parked across the street from the liquor store, near the church. Cross testified that he got out of the Oldsmobile to talk to people on the street in an effort to locate Coco, but left his gun on the front seat of the car. He claimed that he did not see or talk to Walton and Hodges. As he "was walking toward the car," a red Corvette driven by K. K. Parker drove up and parked behind the Oldsmobile. Parker went to the liquor store, and the other man in the Corvette walked up

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[15] At that time Highsmith's body had not yet been found.

[16] Not $6,700 as was mistakenly reported in his prior statement to the police.

to Cross on the sidewalk and said, "I'm Coco." Coco said, "I don't take cars," and claimed he had not seen the Iroc. While holding a gun in one hand, defendant then grabbed Coco from behind and backed him into the trunk of the Oldsmobile. Cross got in the front passenger seat of the car as defendant told Kingdom to get the keys from the ignition and open the trunk. Cross "heard shots" from behind the car, probably "about six," and ducked down. He did not know if Coco was shot, but thought it was "a possibility." The trunk was then shut and Kingdom ran to the front passenger side of the Oldsmobile. Cross "scooted" into the driver's seat, took the keys from Kingdom, and drove away after Kingdom exclaimed, "be out." Defendant drove off in the red Corvette.

When they reached 100th and Voltaire Streets, the red Corvette was abandoned. They drove in the Oldsmobile to the E-Z 8 motel, where Cross and Kingdom left the car. Cross went to his room to pack for his planned trip to Mississippi. Defendant returned to the motel and they all drove to 100th and MacArthur. Cross did not know if Highsmith was still in the trunk of the car. Cross exited the car there before defendant and Kingdom "drove off" without him. After a few minutes, one of Cross's partners named Jay "pulled up" in a blue Toyota. Cross and Jay "drove around" and smoked some joints for a while before they returned to 100th and MacArthur and saw Oakland police officers "all over the place." Cross asked Jay to take him back to the E-Z 8 motel. Kingdom arrived later at the motel room without his car. They did not discuss the fate of Highsmith or events that occurred earlier that day. Cross left the next morning for Mississippi, where he was arrested a few days later. He testified that he "wasn't being truthful" entirely in his two statements to the police to "cover" for defendant and Kingdom.

DISCUSSION

I. The Effect of the Federal District Court's Ruling upon the Retrial of Defendant for Murder.

We first confront defendant's claim that the federal district court's decision in the writ proceeding precludes the present murder conviction. Defendant claims that the effect of the district court's finding of insufficient evidence to support the conviction – without Kingdom's inadmissible statement – is "to bar his conviction on substantially the

same evidence, under either or both of the 'collateral estoppel' or 'law of the case' doctrines." He maintains that the trial court in the present proceeding erred by failing to grant his motions to dismiss the case, and that the judgment must now be reversed. We therefore proceed to an examination of the collateral estoppel and law of the case doctrines as related to the federal district court's order granting defendant's petition for writ of habeas corpus.

A. Collateral Estoppel.

"In criminal cases, the doctrine of collateral estoppel is derived from the double jeopardy clause in the Fifth Amendment." (*In re Cruz* (2003) 104 Cal.App.4th 1339, 1344 [129 Cal.Rptr.2d 31].) "The bar of collateral estoppel prevents relitigation of an issue actually and necessarily decided in a previous civil or criminal action. [Citations.] The principles of res judicata and collateral estoppel provide ' "that a final judgment on the merits bars the parties or those in privity with them from litigating the same cause of action in a subsequent proceeding and collaterally estops parties or those in privity with them from litigating in a subsequent proceeding on a different cause of action any issue actually litigated and determined in the former proceeding. . . . [Citations.]" [Citation.]' [Citations.]" (*People v. Howie* (1995) 41 Cal.App.4th 729, 736 [48 Cal.Rptr.2d 505]; see also *McCutchen v. City of Montclair* (1999) 73 Cal.App.4th 1138, 1144 [87 Cal.Rptr.2d 95]; *People v. Meredith* (1992) 11 Cal.App.4th 1548, 1556 [15 Cal.Rptr.2d 285].) "[F]ive threshold requirements" must be established for collateral estoppel to bar relitigation of an issue: "1) the issue to be precluded must be identical to that decided in the prior proceeding; 2) the issue must have been actually litigated at that time; 3) the issue must have been necessarily decided; 4) the decision in the prior proceeding must be final and on the merits; and 5) the party against whom preclusion is sought must be in privity with the party to the former proceeding." (*People v. Garcia* (2006) 39 Cal.4th 1070, 1077 [48 Cal.Rptr.3d 75, 141 P.3d 197]; *People v. Vogel* (2007) 148 Cal.App.4th 131, 136 [55 Cal.Rptr.3d 403].) The purposes of the collateral estoppel doctrine have been identified "as promoting judicial economy by minimizing repetitive litigation, preventing inconsistent judgments that undermine the integrity of the judicial system, and

providing repose by preventing a person from being harassed by vexatious litigation." (*People v. Lawley* (2002) 27 Cal.4th 102, 163 [115 Cal.Rptr.2d 614, 38 P.3d 461]; see also *Syufy Enterprises v. City of Oakland* (2002) 104 Cal.App.4th 869, 878 [128 Cal.Rptr.2d 808].)

The United States Supreme Court has "stated that 'the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." [Fn. omitted.] The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." [Citation.]' [Citation.]" (*People v. Santamaria* (1994) 8 Cal.4th 903, 912 [35 Cal.Rptr.2d 624, 884 P.2d 81], quoting from *Ashe v. Swenson* (1970) 397 U.S. 436, 444 [25 L.Ed.2d 469, 90 S.Ct. 1189].) "In deciding whether the doctrine is applicable in a particular situation a court must balance the need to limit litigation against the right of a fair adversary proceeding in which a party may fully present his case." (*Gutierrez v. Superior Court* (1994) 24 Cal.App.4th 153, 158 [29 Cal.Rptr.2d 376].) "A criminal defendant who asserts 'constitutional collateral estoppel' has the 'burden of establishing the factual predicate for the application of the doctrine . . . .' [Citation.]" (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1187 [5 Cal.Rptr.3d 615].)

Like the California Supreme Court, we express grave doubts that the collateral estoppel doctrine even has application to the retrial of defendant in the *same proceeding* following a reversal of his conviction and the order for a retrial. (*People v. Barragan* (2004) 32 Cal.4th 236, 253 [9 Cal.Rptr.3d 76, 83 P.3d 480].) While the issue has not been definitively resolved, the "high court has never suggested the doctrine applies to the same proceeding. Indeed, it has consistently stated it applies to 'successive prosecutions.' [Citation.] In *Ohio* v. *Johnson* (1984) 467 U.S. 493, 500, footnote 9 [81

L.Ed.2d 425, 434, 104 S.Ct. 2536], the court specifically stated, 'Moreover, in a case such as this, where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable.' In *United States* v. *Dixon* (1993) 509 U.S. [688] [125 L.Ed.2d 556, 113 S.Ct. 2849], a case involving successive prosecutions, the high court, although expressly not deciding the collateral estoppel question in that case because the lower courts had not ruled on it [citation], noted at page [705] [125 L.Ed.2d at pp. 572-573, 113 S.Ct. at p. 2860] that '[t]he collateral-estoppel effect attributed to the Double Jeopardy Clause, [citation], may bar a *later prosecution* for a separate offense where the Government has *lost* an earlier prosecution involving the same facts.' (First italics in original, second italics added.) Most recently, the court has stated, 'Where . . . there is "no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended." [Citation.] Thus, our cases establish that the primary evil to be guarded against is successive prosecutions: "[T]he prohibition against multiple trials is the controlling constitutional principle." [Citation.]' [Citation.]" (*People v. Santamaria, supra,* 8 Cal.4th 903, 913; see also *Schiro v. Farley* (1994) 510 U.S. 222, 229-230 [127 L.Ed.2d 47, 56-57, 114 S.Ct. 783, 789]; *People v. Memro* (1995) 11 Cal.4th 786, 821 [47 Cal.Rptr.2d 219, 905 P.2d 1305]; *People v. Morales, supra*, 112 Cal.App.4th 1176, 1186; *Lennane v. Franchise Tax Bd*. (1996) 51 Cal.App.4th 1180, 1185–1186 [59 Cal.Rptr.2d 602].)

But also like the California Supreme Court, we need not resolve this threshold issue, as we conclude that defendant's collateral estoppel claim fails for another reason: the lack of a final adjudication and decision on the merits that the murder conviction is precluded by lack of evidence. (See *People v. Barragan, supra,* 32 Cal.4th 236, 253–254.) Finality is "a cornerstone" of the collateral estoppel doctrine. (*People v. Scott* (2000) 85 Cal.App.4th 905, 918 [102 Cal.Rptr.2d 622], citing *People v. Mitchell* (2000) 81 Cal.App.4th 132, 143–148, 155 [96 Cal.Rptr.2d 401], disapproved on other grounds in *Barragan, supra*, at p. 252.) Principles of double jeopardy do not attach "until there has been a final determination on the merits, which does not occur simply because a finding

was made in an ongoing proceeding." (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1260 [131 Cal.Rptr.2d 628].) "[C]ollateral estoppel applies only when it is shown that a factual issue which is identical to an issue in the current case was actually litigated and necessarily determined in a prior, final adjudication." (*Johnson v. Lewis* (2004) 120 Cal.App.4th 443, 456 [15 Cal.Rptr.3d 507]; see also *People v. Barragan, supra*, at pp. 252-255; *In re Anthony C.* (2006) 138 Cal.App.4th 1493, 1522 [42 Cal.Rptr.3d 370].) "Thus, in order for res judicata or collateral estoppel to apply there must be a *final* judgment or determination of an issue; that is, a judgment or determination that is final in the sense that *no further judicial act remains to be done to end the litigation*. [Citation.] These principles apply in criminal proceedings as well as civil." (*People v. Scott, supra*, at p. 919, first italics in original, second italics added; see also *Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 448 [27 Cal.Rptr.3d 150].)

We do not consider the federal district court's decision a final judgment within the meaning of the collateral estoppel doctrine. For purposes of issue preclusion, " ' "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.' [Citations.]" (*Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1564 [49 Cal.Rptr.3d 259], italics omitted.) " '[A] "final judgment" is defined as one that is "free from direct attack." [Citation.] Stated differently, "To be 'final' for purposes of collateral estoppel the decision need only be immune, as a practical matter, to reversal or amendment." [Citations.]' " (*People v. Santamaria, supra*, 8 Cal.4th 903, 942, appen. to conc. & dis. opn. of Mosk, J.; see also *id.* at p. 929, fn. 1.) It is " 'the substance and effect of the court's order or judgment and not the label' which determines" whether it is final. (*Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 666 [73 Cal.Rptr.2d 242]; see also *Belio v. Panorama Optics, Inc.* (1995) 33 Cal.App.4th 1096, 1101 [39 Cal.Rptr.2d 737].) When " 'no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties,' " it is not. (*Griset v. Fair*

Political Practices Com. (2001) 25 Cal.4th 688, 698 [107 Cal.Rptr.2d 149, 23 P.3d 43] citing *Lyons v. Goss* (1942) 19 Cal.2d 659, 670 [123 P.2d 11]; see also *Public Defenders' Organization v. County of Riverside* (2003) 106 Cal.App.4th 1403, 1410 [132 Cal.Rptr.2d 81]; *People v. Scott, supra*, 85 Cal.App.4th 905, 919; *Jacobs-Zorne v. Superior Court* (1996) 46 Cal.App.4th 1064, 1070 [54 Cal.Rptr.2d 385].) And where, as here, collateral estoppel is "asserted in the same proceeding, the question of 'finality' is obviously a predicate inquiry. While the proceeding or action still continues, the required finality is necessarily absent." (*People v. Scott, supra*, at p. 919.)

Neither the intent nor the substance of the federal court's decision is indicative of a *final* determination on the sufficiency of the evidence to support the murder charge. First, the court did not determine that the jury verdict was unsupported by the evidence presented at trial. To the contrary, the court concluded that the evidence was "sufficient when the improperly admitted evidence" of Kingdom's statement was considered – as it was at trial – and only "insufficient when the improperly admitted evidence [was] excluded from the equation." The proper remedy in "such a case," the federal court declared is "retrial rather than acquittal." Rather than reverse and finally set aside the murder conviction for lack of supporting evidence, the court expressly remanded the case for retrial to grant the People the opportunity to present the case against defendant anew. Thus, the court did not intend that its decision have any preclusive effect or prevent the retrial of defendant. (See *People v. Scott, supra*, 85 Cal.App.4th 905, 919–921.) The federal court's disposition of the case was effectively "an order for a new trial, placing the parties in the same position as if the cause had never been tried." (*People v. Moore* (2006) 39 Cal.4th 168, 174 [45 Cal.Rptr.3d 784, 137 P.3d 959].) "Absent a contrary direction from the appellate court, a general reversal of a criminal judgment is deemed to be an order for a new trial." (*Scott, supra*, at p. 921, italics omitted.) Collateral estoppel precludes retrial only if "no further judicial act remains to be done to end the litigation" of an issue. (*Id.* at p. 919.) A " 'conclusive carry-over effect should not be accorded a judgment which is considered merely tentative in the very action in which it was rendered. On the contrary, the judgment must ordinarily be a firm and stable one, the

"last word" of the rendering court—a "final" judgment.' [Citations.]" (*Id*. at pp. 919–920, italics omitted.) The judgment before us clearly contemplated and mandated the very retrial which occurred, not an end to the case. (*Id*. at p. 923.)

The federal court's remand order was in accord with the rule that double jeopardy and collateral estoppel principles do not bar retrial upon reversal for error in the proceedings below. (*Lockhart v. Nelson* (1988) 488 U.S. 33, 42 [102 L.Ed.2d 265, 109 S.Ct. 285]; *United States v. Scott* (1978) 437 U.S. 82, 90–91 [57 L.Ed.2d 65, 98 S.Ct. 2187]; *People v. Hernandez* (2003) 30 Cal.4th 1, 7 [131 Cal.Rptr.2d 514, 64 P.3d 800]; *People v. Hatch* (2000) 22 Cal.4th 260, 271–274 [92 Cal.Rptr.2d 80, 991 P.2d 165]; *People v. Superior Court* (*Marks*) (1991) 1 Cal.4th 56, 72 [2 Cal.Rptr.2d 389, 820 P.2d 613].) Only reversals based on the legal insufficiency of the evidence at trial may prevent the People from retrying a defendant whose conviction is set aside through direct appeal or collateral attack. (See *Lockhart v. Nelson, supra*, at p. 38; *People v. Seel* (2004) 34 Cal.4th 535, 544 [21 Cal.Rptr.3d 179, 100 P.3d 870]; *People v. Santamaria, supra*, 8 Cal.4th 903, 910–911; *In re Cruz, supra,*104 Cal.App.4th 1339, 1348–1349.) And even "where an appellate court finds that 'the evidence is insufficient to support the verdict,' the 'normal rule' is that the losing party on appeal is 'entitled to a retrial.' [Citation.]" (*People v. Barragan, supra*, 32 Cal.4th 236, 250.) "As a general rule, when there is a conviction, rather than an acquittal or a mistrial, and the judgment of conviction is reversed on appeal or vacated in habeas corpus proceedings due to error in the trial, retrial is permitted. . . . When a writ of habeas corpus vacates a judgment, the parties are placed in the same position as if the first trial had never occurred, and defendant is not in jeopardy until the retrial jury is sworn." (*Sons v. Superior Court* (2004) 125 Cal.App.4th 110, 118 [22 Cal.Rptr.3d 647].) "The Supreme Court has held that the double jeopardy clause bars retrial 'for the defendant who obtains an appellate determination that the trial court should have entered a judgment of acquittal' based on insufficiency of the evidence. [Citations.] The double jeopardy clause does not bar retrial after a reversal based on the erroneous admission of evidence if the erroneously admitted evidence supported the

conviction." (*United States v. Chu Kong Yin* (9th Cir. 1991) 935 F.2d 990, 1001, italics omitted; see also *In re Anthony C., supra,* 138 Cal.App.4th 1493, 1509–1510.)

The federal court's decision was not functionally equivalent to an acquittal based upon failure of proof at trial for double jeopardy or collateral estoppel purposes – the evidence presented at trial was found sufficient to support the conviction – but rather a determination that defendant was convicted through a judicial process which was fundamentally defective due to improper receipt of evidence. (Cf. *Lockhart v. Nelson, supra,* 488 U.S. 33, 41; *People v. Hatch, supra,* 22 Cal.4th 260, 271–272; *People v. McCann* (2006) 141 Cal.App.4th 347, 354–355 [45 Cal.Rptr.3d 868].) The federal court's finding "compels a retrial; it does not bar one." (*In re Cruz, supra,* 104 Cal.App.4th 1339, 1347–1348.) The very order that defendant asks us now to accord "preclusive effect was clearly interlocutory in nature. A remand was ordered to provide the People with the opportunity to present additional evidence" on the charges. (*People v. Scott, supra,* 85 Cal.App.4th 905, 919, italics omitted.) "Clearly, this was not a final order." (*Ibid.*, italics omitted.) The retrial order " 'simply "affords the defendant a second opportunity to seek a favorable judgment" and does not violate the constitutional prohibition against double jeopardy' " or the collateral estoppel doctrine. (*People v. Hernandez, supra,* 30 Cal.4th 1, 7, quoting from *People v. Hatch, supra,* at p. 274.)

Further, affording finality to the federal court's decision would be inconsistent with the nature and purpose of the writ of habeas corpus in the present case. We acknowledge that " '[t]he writ of habeas corpus affords an efficacious means of vindicating an individual's fundamental rights. [Citation.] . . . A final order or judgment granting relief to a petitioner on habeas corpus is a conclusive determination . . . [;] it is res judicata of all issues of law and fact necessarily involved in that result. [Citations.]' [Citation.]" (*People v. Mitchell, supra,* 81 Cal.App.4th 132, 146–147, citing *In re Crow* (1971) 4 Cal.3d 613, 622–623 [94 Cal.Rptr. 254, 483 P.2d 1206], disapproved on other grounds in *People v. Barragan, supra,* 32 Cal.4th 236, 252.) But here, the habeas corpus proceeding "is not a trial of guilt or innocence and the findings of the habeas corpus court do not constitute an acquittal. The scope of a writ of habeas corpus is broad, but in this

case, as in most cases, it is designed to correct an erroneous conviction. It achieves that purpose by invalidating the conviction and restoring the defendant to the position she or he would be in if there had been no trial and conviction. [Citations.] [¶] Thus, the conviction is set aside but the prosecution is not ended." (*In re Cruz, supra,* 104 Cal.App.4th 1339, 1347.)

Prohibiting retrial of the murder charge would also contravene the People's right to a jury trial and conflict with the strong public policy considerations that favor determination of guilt or innocence in a trial. (*In re Cruz, supra,* 104 Cal.App.4th 1339, 1347.) The first jury, having heard and considered all of the evidence, convicted defendant of murder. Reversal of the conviction for the erroneous admission of Kingdom's statement, a due process violation according to the federal court's decision, did not transform the conviction into an effective acquittal. The second jury was given the opportunity by the federal court to assess the evidence presented and ultimately reach the same conclusion on his guilt of the murder of Highsmith. (See *People v. Santamaria, supra*, 8 Cal.4th 903, 925–926.) Declining to apply collateral estoppel principles after appellate reversal of the jury's finding neither created the risk of inconsistent verdicts nor resulted in the sort of harassment of multiple trials that the doctrine seeks to avoid. (*People v. Barragan, supra*, 32 Cal.4th 236, 256–257; *People v. Santamaria, supra*, at p. 914.) The murder conviction by the second jury was consistent, not inconsistent, with the verdict after the first trial, and did not constitute vexatious litigation. (*People v. Taylor* (1974) 12 Cal.3d 686, 695 [117 Cal.Rptr. 70, 527 P.2d 622].) We therefore find that the federal court's decision was not a final judgment for purposes of prohibiting a retrial of defendant under collateral estoppel principles. (*People v. Monge* (1997) 16 Cal.4th 826, 844–845 [66 Cal.Rptr.2d 853, 941 P.2d 1121]; *People v. Bueno* (2006) 143 Cal.App.4th 1503, 1510 [50 Cal.Rptr.3d 161]; *People v. Sotello* (2002) 94 Cal.App.4th 1349, 1356 [115 Cal.Rptr.2d 118]; *People v. Scott, supra*, 85 Cal.App.4th 905, 914, 921.)

B. The Law of the Case Doctrine.

We turn our attention the related doctrine of law of the case. "The law of the case doctrine holds that when an appellate opinion states a principle or rule of law necessary

to the decision, that principle or rule becomes the law of the case and must be adhered to through its subsequent progress in the lower court and upon subsequent appeal. [Citations.] For the doctrine to apply, ' " 'the point of law involved must have been necessary to the prior decision, . . . the matter must have been actually presented and determined by the court, and . . . application of the doctrine will not result in an unjust decision.' [Citations.]" [Citation.]' [Citation.]" (*People v. Superior Court* (*Plascencia*) (2002) 103 Cal.App.4th 409, 432 [126 Cal.Rptr.2d 793].) " 'The principal reason for the doctrine is judicial economy. "Finality is attributed to an initial appellate ruling so as to avoid the further reversal and proceedings on remand that would result if the initial ruling were not adhered to in a later appellate proceeding." ' [Citations.] The law of the case doctrine applies in criminal cases [citation] . . . ." (*People v. Gray* (2005) 37 Cal.4th 168, 196–197 [33 Cal.Rptr.3d 451, 118 P.3d 496].)

The "doctrine of law of the case does not prevent retrial of an issue, although it does require that the same conclusion be reached if that matter is retried on the same evidence." (*People v. Burbine, supra*, 106 Cal.App.4th 1250, 1261.) "Thus, the law-of-the-case doctrine 'prevents the parties from seeking appellate reconsideration of an already decided issue in the same case absent some significant change in circumstances.' [Citation.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 441 [42 Cal.Rptr.3d 677, 133 P.3d 581].) "The doctrine will not be applied, however, when such application leads to an unjust result. Because the law of the case doctrine 'is merely one of procedure and does not go to the jurisdiction of the court [citations], the doctrine will not be adhered to where its application will result in an unjust decision, e.g., where there has been a "manifest misapplication of existing principles resulting in substantial injustice" [citation], or the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations [citation]. The unjust decision exception does not apply when there is a mere disagreement with the prior appellate determination.' [Citation.]" (*People v. Gray, supra,* 37 Cal.4th 168, 197; see also *People v. Martinez* (2003) 31 Cal.4th 673, 683 [3 Cal.Rptr.3d 648, 74 P.3d 748].)

As with the collateral estoppel doctrine, we are persuaded that law of the case principles do not govern the retrial of defendant in the present case, for several reasons. First, no finding has ever been made that the evidence presented during the first trial failed to support the murder conviction. The first jury, two opinions from this court, and even the federal district court, ruled otherwise. The conclusion of the federal court, which we find rather confusing, was that defendant's "right to due process was violated" by the insufficient "evidence to support the murder conviction" adduced at a hypothetical trial–that is, one without evidence of Kingdom's statement. The court's finding was made in the context of its determination that the admission of Kingdom's statement was "not harmless error," and that the cumulative impact of prosecutorial misconduct, improper admission of evidence, and the due process violation, "considered together, prejudiced Cooper so much that his conviction [*sic*] on all counts must be set aside." We have great difficulty imposing upon the second jury the federal court's evaluation of the evidence as "insufficient," when the "evidence" referred to by the court was not that offered at the first trial. We perceive in the application of the law of the case doctrine here a manifest injustice to the prosecution, which did not have the benefit of a prior definitive ruling on the admissibility of Kingdom's statement and the opportunity to present additional evidence at the first trial in light of its ultimate exclusion. We therefore do not consider the issue of the sufficiency of the evidence to support the jury verdict on the murder charge to have been actually adjudicated and finally determined by the federal court for purposes of imposition of the law of the case doctrine.[17]

Second, the federal court's finding of insufficient evidence to support the murder conviction is, at best, only marginally a statement of a rule of law in the case. We acknowledge that law of the case principles may attach to a written resolution of a writ of habeas corpus petition, and further that legal sufficiency of the evidence may be an issue of law that invokes adherence to a reviewing court's statement of decision. (*Kowis v.*

[17] And to the extent it was determined, it was adverse to defendant.

Howard (1992) 3 Cal.4th 888, 894 [12 Cal.Rptr.2d 728, 838 P.2d 250]; *In re Crow, supra,* 4 Cal.3d 613, 622–623; *People v. Pacini* (1981) 120 Cal.App.3d 877, 887 [174 Cal.Rptr. 820].) "[A]n appellate court's determination 'that the evidence is insufficient to justify a finding or a judgment is necessarily a decision upon a question of law.' ([*Estate of Baird* (1924) 193 Cal. 225,] 238 [223 P. 974].) Such a determination 'establishe[s] as the law of the case that all the evidence adduced at the previous trial was insufficient as a matter of law to establish' the finding or judgment. (*Id.* at p. 234; see also *People v. Shuey* (1975) 13 Cal.3d 835, 842 [120 Cal.Rptr. 83, 533 P.2d 211] [doctrine applies to finding of evidence's 'legal sufficiency'].)" (*People v. Barragan, supra*, 32 Cal.4th 236, 246.) "With regard to the question of the legal sufficiency of evidence, the general rule is that '[w]here the sufficiency of the evidence to sustain the judgment depends on the probative value or effect of the evidence itself (*as distinguished from the credibility of witnesses*), and there is no substantial difference in the evidence in the retrial, the former decision is law of the case. [Citations.]' [Citation.]" (*People v. Mitchell, supra*, 81 Cal.App.4th 132, 149, italics added, disapproved on other grounds in *People v. Barragan, supra*, at p. 250.)

However, "[T]he law-of-the-case doctrine governs only the *principles of law* laid down by an appellate court, as applicable to a retrial of fact, and it controls the outcome on retrial only to the extent the evidence is substantially the same." (*People v. Boyer, supra,* 38 Cal.4th 412, 442.) The doctrine is subject to an important limitation: it " 'does not embrace the facts themselves . . . .' [Citation.]" (*People v. Barragan, supra*, 32 Cal.4th 236, 246.) Here, the federal court's finding of the insufficiency of the evidence to sustain the judgment did not depend solely upon an assessment of the probative value of the evidence, but, as we read the decision, was primarily based upon evaluations of the credibility of prosecution witnesses and inferences drawn by the court that were contrary to those of the first jury. We do not interpret the federal court's decision as a final declaration of a principle of law in the case. (See *People v. Scott, supra*, 85 Cal.App.4th 905, 919.)

Finally, and of most significance to us, the second jury was presented with different evidence to assess. In a criminal case, law of the case principles only come into play if upon remand the People attempt to prove an allegation "using only the evidence presented at the first trial." (*People v. Scott, supra*, 85 Cal.App.4th 905, 924.) The law of the case doctrine does not prevent a retrial, does not preclude the presentation of new evidence upon remand, does not limit the new evidence a party may introduce at a retrial, and only compels the same result if the People attempt on remand to prove the charge using the substantially same evidence. (*People v. Boyer, supra,* 38 Cal.4th 412, 442; *People v. Jenkins* (2006) 140 Cal.App.4th 805, 816 [44 Cal.Rptr.3d 788]; *People v. Franz* (2001) 88 Cal.App.4th 1426, 1456 [106 Cal.Rptr.2d 773]; *People v. Scott, supra*, at p. 924.) "Even where the appellate court reverses based on 'the "sufficiency of the evidence", the rule of the law of the case may not be extended to be an estoppel when new material facts, or evidence, or explanation of previous evidence appears in the subsequent trial. [Citations.]' [Citation.]" (*People v. Barragan, supra*, 32 Cal.4th 236, 246–247; see also *People v. Monge, supra,* 16 Cal.4th 826, 845.)

Upon comparison of the first and second trials, we find that the evidence presented was not the same. Kingdom's statement had been excluded, so it was of course not considered in the second trial.[18] Critical testimony from Juanita Walton was received at the second trial, rather than read from her prior statements or abbreviated preliminary hearing testimony as it had been at the first trial. Walton corroborated the testimony of Hodges that identified defendant and placed him at the scene of the kidnapping of Highsmith only moments before the crime occurred. Walton's testimony also provided corroborated testimony from Cross that Highsmith was confronted and abducted because defendant, along with Cross and Kingdom, believed he had stolen a vehicle containing

[18] Favorable to the prosecution or not, the exclusion of Kingdom's statement certainly made the evidence substantially different in the second trial.

their drugs—thereby providing a motive for the abduction and killing.[19] The accounts of the kidnapping given by Hodges, Rodney Love and Musa Hussein varied from the first trial, although not materially so. The defense evidence at the second trial also did not include alibi testimony from defendant or his wife. Given the context of the federal court's finding of insufficiency of the evidence and upon our review of the record, we conclude that a retrial of defendant was not precluded and the jury was not estopped by law of the case principles from convicting defendant of the murder of Highsmith. (*McCutchen v. City of Montclair, supra,* 73 Cal.App.4th 1138, 1148.)

II. The Denial of Defendant's Motions for Substitution of Counsel.

Defendant challenges the trial court's denial of his *Marsden* motions, and his subsequent *Faretta* motion to represent himself.[20] We deal first with the court's refusal to appoint new counsel for defendant.

The record shows that immediately after defendant received an appointed attorney on May 19, 2004, he advised the court that "antagonism" had developed with counsel. He claimed counsel had "broken the attorney/client privilege" in communications with the court, and had expressed that she did not want the case. Counsel advised the court that although her relationship with defendant was not "pleasant," she was willing take the case despite the "time constraints" associated with defendant's refusal to waive time. Defendant reiterated that he lacked confidence in counsel and was "not willing to accept her" as his attorney. The court found no grounds to discharge counsel and denied the *Marsden* motion.

Defendant renewed his *Marsden* motion at a hearing on July 6, 2004. He again expressed concern with counsel's violation of the attorney-client privilege by disclosing the "strategy" of the case, mentioned counsel's "sub-par" performance by failing to

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[19] Walton testified that defendant asked if Highsmith was the "type of nigger" who would steal a car.

[20] *People v. Marsden* (1970) 2 Cal.3d 118 [84 Cal.Rptr. 156, 465 P.2d 44]; *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525] (*Faretta).*

respond to misstatements of law by the prosecutor and court at a prior hearing, and complained of counsel's failure to confer with him "on her defense strategy" or call his alibi witnesses. Defendant stated: "There is just no way we can work together." Counsel was asked to respond. She denied any violation of the attorney-client privilege or failure to contest misstatements of law during a pretrial motion. Counsel also explained that upon her inquiry she concluded defendant's proposed alibi defense evidence was "terrible" and actually harmful to his case. Counsel clarified for the court that the investigator was busy seeking witnesses to the homicide rather than meeting with defendant. Counsel acknowledged that she told defendant, "I don't want the case" when she was first appointed, and that her relationship with defendant was strained due to his insistence that she "file and do whatever he wants." Defendant then claimed that counsel did not believe him or his witnesses; as a result, defendant stated, he had no "confidence in her cross-examining any witness" or being an advocate for him. He reiterated that they had a "conflict" from "day one." Defendant also offered to waive time to obtain a new attorney. The court found no "breakdown in the relationship" or other reason to substitute counsel, and the motion was again denied.

Another *Marsden* motion was presented to the court on September 21, 2004. Defendant repeated his conflicts with counsel and asserted that "the relationship is irreconcilable." He stated that counsel "cursed" him "out" and declared "she hates" him. Defendant also complained that counsel repeatedly "blows up" and "stalks off" when they "have run ins." Defendant added that he and counsel "can't see eye to eye" on the trial strategy, and she refuses to consider his input in the case. Counsel agreed that she was "very angry with him," "blew up," and "walked out" at a meeting the week before due to defendant's insistence upon arguing "the law" with her. Counsel said she later apologized to defendant, however, and denied that she expressed hatred for him. Counsel agreed that she and defendant continually clashed over his directive that she "do what I tell you to do." She nevertheless expressed her conviction that they could "work together," and felt she "could represent him completely" and competently. Counsel further indicated she was prepared and ready to proceed to trial. The court accepted

counsel's representations and found that the necessary grounds to relieve counsel had not been presented. The motion was once more denied.

Defendant now argues that he demonstrated a "lack of trust" in his attorney and "an irreconcilable conflict between client and counsel" that justified substitution of counsel under *Marsden*. He also submits that counsel's admission to him that she had not yet formulated an opening argument "on the eve of trial" indicates her lack of adequate preparation. He claims that "[u]nder these circumstances" the denial of his request to substitute attorneys was erroneous.

" '[T]he decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney during the trial is within the discretion of the trial court, and a defendant has no absolute right to more than one appointed attorney.' [Citation.]" (*People v. Leonard* (2000) 78 Cal.App.4th 776, 786 [93 Cal.Rptr.2d 180].) The court is not obligated to appoint independent counsel absent adequate proof of need by the defendant. (*People v. Memro, supra,* 11 Cal.4th 786, 858–859; *People v. Smith* (1993) 6 Cal.4th 684, 696 [25 Cal.Rptr.2d 122, 863 P.2d 192]; *People v. Sharp* (1994) 29 Cal.App.4th 1772, 1786 [36 Cal.Rptr.2d 117], overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452 [45 Cal.Rptr.2d 905, 903 P.2d 1037].) "The court should deny a request for new counsel at any stage unless it is satisfied that the defendant has made the required showing." (*People v. Smith, supra,* at p. 696; *Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1022–1023 [61 Cal.Rptr.2d 49].) Appointment of substitute counsel is necessary, "when, and only when, . . . under the *Marsden* standard, . . . in the exercise of its discretion, the court finds that the defendant has shown that a failure to replace the appointed attorney would substantially impair the right to assistance of counsel [citation], or, stated slightly differently, if the record shows that the first appointed attorney is not providing adequate representation or that the defendant and the attorney have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citation]." (*People v. Smith, supra,* at p. 696; see also *People v. Fierro* (1991) 1 Cal.4th 173, 204 [3 Cal.Rptr.2d 426, 821 P.2d 1302]; *People v. Crandell* (1988) 46 Cal.3d 833, 854 [251 Cal.Rptr. 227, 760 P.2d 423]; *People v.*

Leonard, supra, at p. 786.) "This is true *whenever* the motion for substitute counsel is made." (*People v. Smith, supra,* at p. 696.)

"When a criminal defendant seeks substitution of counsel on the ground that appointed counsel is providing inadequate representation, a trial court must give the defendant an opportunity to explain the reasons for the request." (*People v. Mendoza* (2000) 24 Cal.4th 130, 156–157 [99 Cal.Rptr.2d 485, 6 P.3d 150].) " 'A judicial decision made without giving a party an opportunity to present argument or evidence in support of his contention "is lacking in all the attributes of a judicial determination." [Citation.]' [Citation.]" (*People v. Jones* (2003) 29 Cal.4th 1229, 1244 [131 Cal.Rptr.2d 468, 64 P.3d 762].) " '[T]he trial court cannot thoughtfully exercise its discretion in this matter without listening to [the defendant's] reasons for requesting a change of attorneys.' [Citation.] Accordingly, 'When a defendant moves for substitution of appointed counsel, the court must consider any specific examples of counsel's inadequate representation that the defendant wishes to enumerate. . . .' [Citation.]" (*People v. Smith, supra,* 6 Cal.4th 684, 690–691.) " '[T]he inquiry is forward-looking in the sense that counsel would be substituted in order to provide effective assistance in the future. But the decision must always be based on what has happened in the past.' [Citation.]" (*People v. Sharp, supra,* 29 Cal.App.4th 1772, 1787, italics omitted.) " 'Thereafter, substitution is a matter of judicial discretion. Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel. [Citations.]' [Citation.]" (*People v. Smith, supra,* at pp. 690–691.)

We conclude that before denying the motion the trial court properly granted defendant the opportunity to thoroughly articulate the specific reasons for seeking substitution of counsel, and defendant does not argue otherwise. (*People v. Lucky* (1988) 45 Cal.3d 259, 281 [247 Cal.Rptr. 1, 753 P.2d 1052]; *People v. Lewis* (1978) 20 Cal.3d 496, 497 [143 Cal.Rptr. 138, 573 P.2d 40]; *People v. Sharp, supra*, 29 Cal.App.4th 1772, 1786.) Defendant presented all of his complaints with counsel's performance and the

grounds for his dissatisfaction with the attorney-client relationship. Counsel's rebuttal to defendant's complaints was also heard by the trial court.

We further find no error in the denial of the *Marsden* motion. Defendant's primary grievance is that counsel did not proceed with the case in the manner he requested. His claims fall within the category of disagreement over strategy that does not compel substitution of counsel. We cannot find fault with counsel's resolve to retain control over tactical matters. Often repeated is the rule that " '[t]here is no constitutional right to an attorney who would conduct the defense of the case in accord with the whims of an indigent defendant. [Citations.] Nor does a disagreement between defendant and appointed counsel concerning trial tactics necessarily compel the appointment of another attorney. [Citations.]' [Citation.]" (*People v. Padilla* (1995) 11 Cal.4th 891, 927 [47 Cal.Rptr.2d 426, 906 P.2d 388]; see also *People v. Lara* (2001) 86 Cal.App.4th 139, 151 [103 Cal.Rptr.2d 201]; *Ng v. Superior Court, supra,* 52 Cal.App.4th 1010, 1022.) "A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citation.] Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.' 'When a defendant chooses to be represented by professional counsel, that counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.' [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 728–729 [85 Cal.Rptr.2d 203, 976 P.2d 754].) Further, defendant "was not entitled to claim that an irreconcilable conflict had arisen merely because he could not veto" his attorney's "reasonable tactical decisions." (*People v. Memro, supra,* 11 Cal.4th 786, 858.)

Nor do we find that the attorney-client relationship had so deteriorated that substitution of counsel was necessary. "[A] 'conflict' regarding tactical matters neither justifies substitution of counsel nor signals a fundamental breakdown in the attorney-client relationship." (*People v. Nakahara* (2003) 30 Cal.4th 705, 719 [134 Cal.Rptr.2d 223, 68 P.3d 1190].) " 'A disagreement concerning tactics is . . . insufficient to compel the discharge of appointed counsel, unless it signals a complete breakdown in the attorney-client relationship.' " (*People v. Hart* (1999) 20 Cal.4th 546, 604 [85

Cal.Rptr.2d 132, 976 P.2d 683], quoting from *People v. Crandell, supra,* 46 Cal.3d 833, 859–860.) Although defendant asserted the relationship with counsel had declined to the extent that it was "irreconcilable," counsel acknowledged the conflict but advised the court that she and defendant were capable of cooperating to a degree that competent representation would result. Moreover, defendant did not in any way establish that ineffective representation was likely to occur. " 'To the extent there was a credibility question between defendant and counsel at the hearing, the court was "entitled to accept counsel's explanation." [Citation.]' [Citation.] If a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment, and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law." (*People v. Jones, supra,* 29 Cal.4th 1229, 1245–1246.) We conclude that the trial court did not abuse its discretion by denying defendant's motions for substitution of counsel. (*People v. Smith* (2003) 30 Cal.4th 581, 607–608 [134 Cal.Rptr.2d 1, 68 P.3d 302].)

III. The Denial of Defendant's Motions to Represent Himself.

We proceed to the claim that defendant was improperly denied the right to represent himself. Defendant insists that he unequivocally and timely exercised his right of self-representation under *Faretta, supra,* 422 U.S. 806, 820. Therefore, he maintains that the trial court's refusal to recognize his constitutional right to self-representation "requires reversal *per se*."

"*Faretta* holds that the Sixth Amendment grants an accused personally the right to present a defense and thus to represent himself upon a timely and unequivocal request." (*People v. Dunkle* (2005) 36 Cal.4th 861, 908 [32 Cal.Rptr.3d 23, 116 P.3d 494].) "[T]he Sixth Amendment guarantees a defendant a right to counsel but also allows him to waive this right and to represent himself without counsel." (*United States v. Erskine* (9th Cir. 2004) 355 F.3d 1161, 1167, italics omitted; see also *People v. Marshall* (1997) 15 Cal.4th 1, 20 [61 Cal.Rptr.2d 84, 931 P.2d 262]; *People v. Williams* (2003) 110 Cal.App.4th

1577, 1585 [2 Cal.Rptr.3d 890].) And, "*Faretta* error is reversible per se." (*People v. Valdez* (2004) 32 Cal.4th 73, 98 [8 Cal.Rptr.3d 271, 82 P.3d 296].)

"The right, however, is not absolute. 'To invoke the constitutional right to self-representation, a criminal defendant must make an *unequivocal* assertion of that right in a timely manner. [Citation.] "The court faced with a motion for self-representation should evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words. Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-representation may support the court's decision to deny the defendant's motion. A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made for the purpose of delay or to frustrate the orderly administration of justice may be denied." [Citation.] . . .' [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 683 [27 Cal.Rptr.3d 360, 110 P.3d 289].) "[T]he waiver of counsel must be *knowing and voluntary*—that is, the defendant must 'actually . . . understand the significance and consequences' of the decision, and the decision must be 'uncoerced' [citations]." (*People v. Stewart* (2004) 33 Cal.4th 425, 513 [15 Cal.Rptr.3d 656, 93 P.3d 271].) "The right to representation by counsel persists until a defendant affirmatively waives it, and courts indulge every reasonable inference against such waiver." (*People v. Dunkle, supra,* 36 Cal.4th 861, 908; see also *Brewer v. Williams* (1977) 430 U.S. 387, 391, 404 [51 L.Ed.2d 424, 97 S.Ct. 1232].)

We review the proceedings to determine whether defendant's assertion of the right to self-representation was both timely and unequivocal. The first mention of self-representation was at the hearing on May 19, 2004, when following the court's pronouncement that appointed defense counsel would not be discharged defendant queried, "How do I represent myself?" The court disclosed to defendant that he had the right to represent himself, but reiterated that appointed counsel would not be removed. No further request for self-representation was then made.

On September 21, 2004, with the case set for trial, at the conclusion of the *Marsden* hearing defendant declared: "I would like to go pro per and get a copy of this

transcript." After denial of the *Marsden* motion defendant again indicated that he wanted to represent himself, and asked for a return of the records from counsel. The court directed defendant to read the "*Faretta* form" to "understand all the risks" he was taking, and put the matter over until the next day. Defendant was warned that a further continuance of the trial would not be granted. The following day, defendant appeared with the completed *Faretta* form. Defendant complained that his "first choice" was not "to want to go pro per," but he had been denied the right to substitute counsel and wanted to "appeal" that decision. In response to the trial court's statement that the request seemed "equivocal," defendant indicated that self-representation was "the only option I have at my disposal now." Defendant then said that he wanted to "jettison this lawyer . . . because the lawyer cussed me out." Defendant was advised that a courtroom was ready for trial. He proclaimed that he was unprepared and needed to "bring a writ" on the *Marsden* motion denial and study the discovery in the case. The *Faretta* motion was then denied as "untimely."

Counsel asked the court to reconsider the *Faretta* motion the next day. Defendant was asked if he could be ready for trial in six days – on September 29, 2004 – if the trial was continued to that date. Defendant replied that he needed "at least two weeks" to prepare for trial. He again complained that counsel "hates me" and "cursed me out." The court advised defendant that the *Marsden* motion had been denied and would not be revisited. Defendant again stated, "This isn't my first choice to go pro per. I want counsel." He repeatedly mentioned that he would "prefer to have counsel to represent" him. The court then found that defendant made "an equivocal statement of a desire to represent" himself, and the *Faretta* motion was denied.

We agree with the trial court that defendant's request for self-representation was both untimely and equivocal. "*Faretta's* emphasis 'on the defendant's knowing, voluntary, unequivocal, and competent invocation of the right suggests that an insincere request or one made under the cloud of emotion may be denied.' [Citation.] '[A] motion made out of a temporary whim, or out of annoyance or frustration, is not unequivocal—even if the defendant has said he or she seeks self-representation.'

[Citations.]" (*People v. Danks* (2004) 32 Cal.4th 269, 295–296 [8 Cal.Rptr.3d 767, 82 P.3d 1249].) The requirement of an unequivocal *Faretta* request " 'is necessary in order to protect the courts against clever defendants who attempt to build reversible error into the record by making an equivocal request for self-representation.' [Citation.]" (*People v. Roldan, supra,* 35 Cal.4th 646, 683.)

We realize, as pointed out by defendant, that a distinction is drawn between "an 'equivocal' request" and a " 'conditional' request. There is nothing equivocal in a request that counsel be removed and, if not removed, that the defendant wants to represent himself. Once the court has decided not to remove counsel, the defendant has the choice of going ahead with existing counsel or representing himself. There is nothing improper in putting the defendant to this choice, so long as the court did not err in refusing to remove counsel. [Citations.] If, under these circumstances, the defendant elects to represent himself, he need not show that he would make the same decision if offered other counsel." (*People v. Michaels* (2002) 28 Cal.4th 486, 524 [122 Cal.Rptr.2d 285, 49 P.3d 1032].)

Here, however, the record strongly suggests to us that defendant sought self-representation out of the annoyance or frustration associated with the denial of his requests to discharge his appointed attorney, not as a voluntary waiver of the right to counsel. (See *People v. Danks, supra,* 32 Cal.4th 269, 295–296.) Defendant moved to represent himself only after denial of his *Marsden* motions, and obviously with great reluctance. He expressed on numerous occasions to the trial court that his "first choice" was not "to go pro per," but he felt compelled to do so due to the conflict with his appointed attorney. Even after defendant completed the *Faretta* form which advised him of the consequences of self-representation, he continued to emphasize to the court that he preferred to "have counsel."

" 'The court faced with a motion for self-representation should evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words. Because the court should draw every reasonable inference against waiver of the right to counsel, the defendant's conduct or words reflecting ambivalence about self-

representation may support the court's decision to deny the defendant's motion. . . .' [Citation.]" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1087 [74 Cal.Rptr.2d 121, 954 P.2d 384].) "*Faretta's* emphasis 'on the defendant's knowing, voluntary, unequivocal, and competent invocation of the right suggests that an insincere request or one made under the cloud of emotion may be denied.' [Citation.]" (*People v. Danks, supra,* 32 Cal.4th 269, 295.) Our reading of the record convinces us that defendant was obviously seeking to impress upon the court just how dissatisfied he was with his present counsel, more than he was voluntarily invoking the right to self-representation. (*People v. Skaggs* (1996) 44 Cal.App.4th 1, 5–6 [51 Cal.Rptr.2d 376].) We agree with the trial court that under the circumstances presented defendant's request to represent himself was neither voluntary nor unequivocal. (See *Jackson v. Ylst* (9th Cir.1990) 921 F.2d 882, 888; *People v. Danks, supra,* at p. 296; *People v. Williams, supra,* 110 Cal.App.4th 1577, 1586–1587; *People v. Scott* (2001) 91 Cal.App.4th 1197, 1205 [111 Cal.Rptr.2d 318]; *People v. Skaggs, supra,* at pp. 5–6.)

Finally, the factors of the length and stage of the trial and the disruption and delay that would result from granting self-representation also strongly support the trial court's denial of the *Faretta* motion. (*People v. Roldan, supra,* 35 Cal.4th 646, 684.) Defendant's case had dragged on for many years. He had made multiple, unsuccessful *Marsden* motions, and his second *Faretta* motion came on the eve of the scheduled trial. Defendant affirmed that he would need a continuance to prepare for trial if permitted to represent himself at that late date. The trial court was justified in finding that further disruption and delay would result from granting a *Faretta* motion that was equivocal in nature and founded upon a conflict with counsel that did not warrant substitution. (*People v. Roldan, supra,* at p. 684.) The *Faretta* motions were properly denied.

IV. The Instruction on Defendant's Custodial Status.

Defendant objects to the trial court's *sua sponte* instruction at the commencement of trial that advised the jury of his custodial status. The court essentially advised the jury that the fact defendant was in custody only "means one thing, and that is, he's unable to make bail," and was "totally irrelevant to the question of his guilt." The instruction

further admonished the jurors that his custodial status was not to be considered as evidence of guilt.[21] The next day, defense counsel complained that the custody instruction was prejudicial to defendant. The court acknowledged that the instruction may have been ill advised, but maintained that it was not prejudicial to defendant. Defendant now claims that the instruction, along with his custodial status, violated his "due process and equal protection rights."

"In considering a claim of instructional error we must first ascertain what the relevant law provides, and then determine what meaning the instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights." (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585 [102 Cal.Rptr.2d 254]; see also *Sandstrom* v. *Montana* (1979) 442 U.S. 510, 514 [61 L.Ed.2d 39, 99 S.Ct. 2450]; *People v. Warren* (1988) 45 Cal.3d

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[21] In full, the instruction was as follows: "I'm going to throw something else at you that you're not to consider as part of your decision-making process. I seem to be talking a lot about that, but that's kind of what we end up doing. If you haven't noticed already, you will eventually, while you might see the attorneys in the elevator or on the first floor, out on the street, walking up to the building, you're not going to encounter Mr. Cooper. Why? Because Mr. Cooper is in custody. He's going to be coming into the courtroom by a different route than you will, and you're not to speculate about that. You're not to think, 'Ahh, there must be a reason why he's in custody.' And you're not to think, 'Well, if he's in custody, it's probably an indication that he's somehow guilty.' [¶] Number one, that doesn't necessarily mean that at all. Here is basically what it means. It means one thing, and, that is, he's unable to make bail, and I'm sure you would all agree how fundamentally unfair it would be to find somebody guilty of a crime, in whole or in part, because he can't make bail. So his being in custody is totally irrelevant to the question of guilt or whether—whether you're guilty or not guilty, and, again, we go back to proven or not proven by evidence presented in this courtroom. [¶] And the fact that Mr. Cooper is in custody during the course of this trial is not evidence, is not to be considered by you as such. It means nothing to the outcome of this trial. Just as the fact that criminal charges were filed against him, it means nothing to the outcome of this trial, except for one thing: they're the thing that got us here. They define what the issues are, and they define or tell us what the decisions are that you need to make, as far as proven or not proven, whether you are to assume because charges are filed here that that means he's guilty? No. Can you think that? No. It's irrelevant. [¶] There'[re] people who seem to think that—going back to the notion that where there's smoke, there's fire, there must be something to this. Well, of course, nobody pulled his name out of a hat. Somebody didn't decide at random, 'Let's pick this guy to file charges against for these things that happened back in 1995.' We all, using our common sense, would expect that [the prosecutor] is here feeling that he's got evidence that he is going to present to you that he has a reasonable expectation is going to convince you of something, but the question is, is that evidence going to prove Mr. Cooper guilty or not? So the fact he's even here is not evidence. The evidence will come in other forms."

471, 487 [247 Cal.Rptr. 172, 754 P.2d 218]; *People v. Smith* (1992) 9 Cal.App.4th 196, 201 [11 Cal.Rptr.2d 645].) "In order to prevail on a claim that the jury instructions are misleading, the claimant must prove a reasonable likelihood that the jury misunderstood the instructions as a whole. [Citation.] ' " 'The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole.' " ' [Citation.]" (*People v. Van Winkle* (1999) 75 Cal.App.4th 133, 147 [89 Cal.Rptr.2d 28]; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 70–75 [116 L.Ed.2d 385, 112 S.Ct. 475]; *People v. Smithey* (1999) 20 Cal.4th 936, 963 [86 Cal.Rptr.2d 243, 978 P.2d 1171]; *People v. Andrade, supra,* at p. 585.) Further, " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1112 [93 Cal.Rptr.2d 433].)

We agree with the trial court's assessment of the custody instruction on both counts: the reference to defendant's custody was unnecessary and best omitted from the charge to the jury, but it also did not result in prejudicial error. The custody instruction was not comparable to imposition of a requirement upon the defendant that he attend trial wearing jail clothing, which has been found to " 'undercut the presumption of innocence by creating an unacceptable risk that the jury will impermissibly consider this factor. . . .' [Citation.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1336 [65 Cal.Rptr.2d 145, 939 P.2d 259]; cf. *People v. Taylor* (1982) 31 Cal.3d 488, 494 [183 Cal.Rptr. 64, 645 P.2d 115].) Instead, the court expressly directed the jury not to consider defendant's custody to prove guilt. We perceive that the custody instruction was not in substance materially different than CALJIC No. 1.00, which, in pertinent part, advised the jury, "You must not be influenced by pity for or prejudice against a defendant. You must not be biased against a defendant because he has been *arrested for this offense, charged with a crime, or brought to trial*. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that a defendant is more likely to be guilty than not guilty." (Italics added.) The CALJIC No. 1.00 instruction does not have a tendency to confuse or mislead the jury or to suggest that the prosecution has any burden other than

proof of guilt beyond a reasonable doubt based solely upon the evidence adduced at trial. (See *People v. Jurado* (2006) 38 Cal.4th 72, 127 [41 Cal.Rptr.3d 319, 131 P.3d 400]; *People v. Crew* (2003) 31 Cal.4th 822, 847–848 [3 Cal.Rptr.3d 733, 74 P.3d 820].) "A reasonable juror would understand this instruction as an advisement to disregard the facts that defendant had been arrested, charged, and brought to trial, and to presume the defendant innocent. 'Constitutional jurisprudence has long recognized [instruction on the presumption of innocence] as one way of impressing upon the jury the importance of the right to have one's guilt "determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, *continued custody, or other circumstances not adduced as proof at trial*. . . ." [Citation.]' [Citations.]" (*People v. Wade* (1995) 39 Cal.App.4th 1487, 1492 [46 Cal.Rptr.2d 645], italics added.)

The instruction given here by the trial court merely added the element of custody to the equation, which the trial court explained to the jury was only the result of defendant's inability to post bail, and not indicative of guilt. The jury was also fully and completely instructed on the prosecution's burden to prove guilt beyond a reasonable doubt, and on the evidence to be considered in deciding whether the prosecution met this burden. The custody instruction further advised the jury that the fact of defendant's custody was irrelevant, and his guilt was to be determined upon the admissible "evidence presented in this courtroom." We must presume the jurors followed the court's admonition and did not consider defendant's custody as evidence of his guilt. (*People v. Avila* (2006) 38 Cal.4th 491, 574 [43 Cal.Rptr.3d 1, 133 P.3d 1076].) Finally, the prosecutor never referred to the circumstance that defendant was in custody or argued that his guilt should be established by other than the evidence presented. (*People v. Bradford, supra,* 15 Cal.4th 1229, 1335–1336.) We therefore conclude that the custody instruction did not mislead the jurors from their proper deliberative course or otherwise constitute prejudicial error. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 71–73 [14 Cal.Rptr.2d 133, 841 P.2d 118]; *People v. Wade, supra,* 39 Cal.App.4th 1487, 1490–1491.)

V. The Trial Court's Comments to the Jury on Accomplice Testimony.

Appellant also complains of the trial court's comments in response to a request from the jury during deliberations to "explain accomplice testimony further." In addition to re-reading the standard instructions on the definition of accomplices and corroboration (CALJIC Nos. 3.01, 3.10, 3.11, 3.12, 2.20 and 2.50.2), the court identified Cross as an accomplice as a matter of law, but directed the jury to determine whether a "preponderance of the evidence" established that Walton was an accomplice. For any witness found to be an accomplice, the court stated, independent evidence "which tends to connect the defendant with the commission of the crime" is required to provide corroboration, but the independent corroborating evidence does not "have to be sufficient in and of itself to convict" defendant. If the testimony of an accomplice like Cross was not so corroborated, the court explained, "we treat his testimony like we never heard of it." If "other evidence" believed by the jury tends to connect defendant with the commission of the crimes, then Cross's testimony is brought "back in, and now you can consider it" in the same manner as any other testimony.

The court then advised the jury that if Walton was found to be an accomplice, her testimony could not corroborate Cross unless it was in turn corroborated by another, independent source; "[y]ou cannot corroborate one accomplice with another, so you have to look elsewhere." But if the jury found that Walton was not an accomplice, her testimony could be considered to corroborate Cross ─ specifically, for example, his testimony that defendant was "one of the three people" in the blue Oldsmobile. The court also explained to the jury that the testimony of Hodges, who was not alleged to be an accomplice, could also corroborate both Cross and Walton. Finally, the court suggested to the jury to "basically go through step-by-step with each witness" or "group of evidence" to determine if it was corroborated, and if so "consider it in its entirety."

Following an objection of defense counsel that the court had expressed "an opinion" on the corroboration of "certain evidence," the jury was admonished: "[P]lease do not conclude from anything I said that I think that corroboration exists in any particular witness's testimony or in any particular evidence, that I expressed any opinion

about what specific evidence might constitute corroboration, or that I think there is or isn't corroboration that exists, or that I believe that Goodie Walton is or isn't an accomplice."

Defendant argues that the trial court exceeded the permissible limits of comment upon the evidence by focusing upon specific accomplice testimony in a manner that "clearly favored" the prosecution's case. He adds that the "issue of corroboration was particularly acute in this case," and thus the error was prejudicial to him.

We begin by first delineating the rule that when the jury requested further elucidation of the law of consideration of accomplice, the court was presented with the statutory obligation "to provide the jury with information the jury desires on points of law." (*People v. Smithey, supra,* 20 Cal.4th 936, 985; see also *People v. Waidla* (2000) 22 Cal.4th 690, 746 [94 Cal.Rptr.2d 396, 996 P.2d 46].) Under Penal Code "section 1138 the court must attempt 'to clear up any instructional confusion expressed by the jury.' [Citation.]" (*People v. Giardino* (2000) 82 Cal.App.4th 454, 465 [98 Cal.Rptr.2d 315].) "This means the trial 'court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the *court has discretion* under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. . . .' [Citation.]" (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1015 [109 Cal.Rptr.2d 464], italics added; see also *People v. Smithey, supra,* at p. 985; *People v. Davis* (1995) 10 Cal.4th 463, 522 [41 Cal.Rptr.2d 826, 896 P.2d 119].) Section 1138 does not demand elaboration upon the standard instructions by the trial court when the jury expresses confusion, but rather directs the court to "consider how it can best aid the jury and decide whether further explanation is desirable, or whether the reiteration of previously given instructions will suffice." (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1331 [52 Cal.Rptr.2d 256].)

We also observe that article VI, section 10 of the California Constitution authorizes comment upon the evidence by the trial court; it "provides, in pertinent part: 'The court may make any comment on the evidence and the testimony and credibility of

any witness as in its opinion is necessary for the proper determination of the cause.' " (*People v. Monterroso* (2004) 34 Cal.4th 743, 780 [22 Cal.Rptr.3d 1, 101 P.3d 956].) " 'On its face, the constitutional language imposes no limitations on the content or timing of judicial commentary, deferring entirely to the trial judge's sound discretion. The appellate courts have recognized, however, that this powerful judicial tool may sometimes invade the accused's countervailing right to independent jury determination of the facts bearing on his guilt or innocence. Hence, the decisions admonish that judicial comment on the evidence must be accurate, temperate, nonargumentative, and scrupulously fair. The trial court may not, in the guise of privileged comment, withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power.' " (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1218 [120 Cal.Rptr.2d 477, 47 P.3d 262] quoting *People v. Rodriguez* (1986) 42 Cal.3d 730, 766 [230 Cal.Rptr. 667, 726 P.2d 113].) "Thus, a trial court has 'broad latitude in fair commentary, so long as it does not effectively control the verdict.' [Citation.] 'We determine the propriety of judicial comment on a case-by-case basis.' [Citation.]" (*People v. Monterroso, supra,* at p. 780.)

In our examination of the propriety of the trial court's remarks to the jury, we must ascertain what meaning was conveyed to the jury. "The meaning of instructions is no longer determined under a strict test of whether a 'reasonable juror' could have understood the charge as the defendant asserts, but rather under the more tolerant test of whether there is a 'reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276 [107 Cal.Rptr.2d 160], italics omitted.)

We find that the court's explanation of accomplice testimony did not result in a misstatement of the law or constitute a violation of the trial court's obligation to comment fairly and impartially upon the evidence. More importantly, we do not think *the jury* interpreted the court's explanation, when read in its entirety, as any form of endorsement

of the credibility of any of the witnesses or the corroboration of any particular testimony. As we read the entirety of the court's response to the jury, unfair comment upon the evidence was avoided. The court did not advise the jurors that a particular witness's testimony had been corroborated or was worthy of belief. (Cf. *People v. Oliver* (1975) 46 Cal.App.3d 747, 752–754 [120 Cal.Rptr. 368].) Rather, the court merely identified the witnesses who may be accomplices – Cross, as a matter of law, and Walton if so found by the jury – and stated the requirements for corroboration of those witnesses before consideration of their testimony. Merely referring to Walton and Hodges as possible corroborating witnesses was neither partial nor misleading, particularly where the court carefully avoided any evaluation of their testimony and specifically advised the jury that no opinion had been expressed "that corroboration exists in any particular witness's testimony or in any particular evidence." The court properly advised the jury upon the standards for consideration of evidence of corroboration, but left to the jury the task of determining the issue. (See *People v. Jones* (1992) 10 Cal.App.4th 1566, 1573–1574 [14 Cal.Rptr.2d 9].) The court did not distort the record, withdraw material evidence from the jury's consideration, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power. (*People v. Slaughter, supra,* 27 Cal.4th 1187, 1217–1218.) Moreover, the court's comments were temperate, and neither exceeded the bounds of fair and impartial judicial comment nor suggested the manner in which the jury should consider the evidence. (*People v. Linwood* (2003) 105 Cal.App.4th 59, 74 [129 Cal.Rptr.2d 73].)

Finally, the court additionally specifically instructed the jury in the terms of CALJIC No. 17.30 that, "I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness. [¶] If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion." Again, we assume the jurors properly followed and correlated the instructions to understand that they, not the trial court, were vested with the duty to determine whether the accomplice testimony was adequately corroborated. (See *People*

v. Kraft (2000) 23 Cal.4th 978, 1077 [99 Cal.Rptr.2d 1, 5 P.3d 68]; *People v. Welch, supra,* 20 Cal.4th 701, 767; *People v. Frazier* (2005) 128 Cal.App.4th 807, 818 [27 Cal.Rptr.3d 336]; *People v. Ayers* (2005) 125 Cal.App.4th 988, 997 [23 Cal.Rptr.3d 242].) We therefore conclude that the court did not erroneously advise the jury or overstep the bounds of its constitutional privilege to comment on the evidence.

VI. The Evidence to Support the Murder Conviction.

We turn to the final issue to resolve: the sufficiency of the evidence to support the murder conviction. Defendant argues that "the evidence of his guilt of murder was marginal and speculative, on its face." He also submits that the reasoning of the federal court in the decision granting the writ of habeas corpus petition "is compelling," and "urges this Court to reach the identical conclusion," even if we do not grant the district court's decision collateral estoppel or law of the case effect.

In our review of the evidence we will adhere to the considerable constraints of the substantial evidence rule. " 'The legal standard is a familiar one: "On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" ' [Citation.] The same rule applies to the review of circumstantial evidence. 'The court must consider the evidence and all logical inferences from that evidence . . . . But it is the jury, not the appellate court, which must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] Therefore, an appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding. [Citations.]' [Citation.] Thus, in evaluating a claim of insufficiency of the evidence, the test is not whether we ourselves are convinced that the evidence proves the defendant guilty beyond a reasonable doubt, but whether sufficient substantial evidence supports the jury's conclusion that it does. [Citation.] Only if it clearly appears 'that upon no hypothesis whatever is there sufficient substantial evidence' to support the verdict may

we reverse. [Citation.]" (*People v. Poindexter* (2006) 144 Cal.App.4th 572, 577 [50 Cal.Rptr.3d 489].) In undertaking our review of "the sufficiency of the evidence, we cannot reweigh the evidence, as the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact." (*People v. Misa* (2006) 140 Cal.App.4th 837, 842 [44 Cal.Rptr.3d 805].)

In light of our limited reviewing function we have no difficulty in finding that the evidence supports the verdict. As the federal court acknowledged, defendant was convincingly identified as one of the three men who abducted Highsmith at gunpoint, forced him into the rear of the blue Oldsmobile, and sped away. Witnesses testified that the men who kidnapped Highsmith, and specifically defendant, wore black gloves and jackets. Shots were fired during the kidnapping. Contrary to the federal court's finding, persuasive evidence connects defendant to the murder of the victim discovered two weeks later with a fatal bullet wound to the head. The victim was found gagged and somewhat bound when he was killed, which suggests that the murder was part of a forced abduction and subsequent execution by more than one person. The pathologist testified that the victim was probably killed on the day he was kidnapped, not some time later. Nothing suggests that the kidnappers released the victim, as he was not seen alive again. Cross's testimony, corroborated partially by Walton – which we must accept on appeal – not only provides defendant with a strong motive to commit the murder, but also places him in the car with Highsmith after the kidnapping with the opportunity to kill the victim.[22] A few hours after the abduction, a witness observed two men in the red Corvette driven away from the kidnapping scene by defendant engaged in throwing something off the San Mateo-Hayward bridge. Three or four hours later that night, defendant was arrested in a vehicle in which black gloves and a black jacket were found. Gunshot residue was detected on the gloves and one sleeve of the jacket. Defendant was also wearing a checkered shirt similar to the one worn by the man who was seen earlier

[22] We observe that Cross's testimony was completely ignored by the federal court.

running from the red Corvette abandoned at the kidnapping scene. We conclude that the murder conviction is supported by substantial evidence.

DISPOSITION

Accordingly, the judgment is affirmed.[23]

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Swager, J.

We concur:

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Marchiano, P. J.

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Stein, J.

[23] In his petition for writ of habeas corpus, defendant has repeated and embellished upon some of the issues presented on appeal, claimed that his appellate attorney failed to raise additional claims of error recommended by defendant, and charged his trial counsel with ineffective representation. We have found no merit to the contentions made by defendant, and therefore have denied the petition for writ of habeas corpus by separate order filed this same date. (*In re Aaron Cooper on Habeas Corpus* (A114440).)

Trial Court	Alameda County Superior Court
Trial Judge	Honorable Jon Rolefson
For Defendant and Appellant	James Kyle Gee, under appointment by the Court of Appeal
For Plaintiff and Respondent	Bill Lockyer and Edmund G. Brown, Jr., Attorneys General Mary Jo Graves, Chief Assistant Attorney General Gerald A. Engler, Senior Assistant Attorney General Bruce Ortega, Deputy Attorney General René A. Chacón, Supervising Deputy Attorney General